

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

NATHANIEL WILLIAMS,

Plaintiff,

v.

DARREN SPIECE, *et al.*,

Defendants.

Case No. 3:19-cv-00176-MMD-CLB

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE¹

Plaintiff has filed a motion for leave to file a fourth amended complaint ("FAC") (ECF No. 29), together with a proposed FAC (ECF No. 29-1), and a motion for leave to file a longer than standard FAC. (ECF No. 30.) The court recommends that both motions be granted (ECF Nos. 29, 30) and that the FAC (ECF No. 29-1) be dismissed, with prejudice, as to all claims except Count V, as further discussed below.

I. BACKGROUND AND PROCEDURAL HISTORY

Plaintiff commenced this action on March 28, 2019, by filing an application to proceed *in forma pauperis* along with a proposed civil rights complaint. (ECF Nos. 1, 1-1.) Before the District Court had an opportunity to screen the original complaint pursuant to 28 U.S.C. § 1915A, Plaintiff filed a first amended complaint. (ECF No. 8.) On January 30, 2020, the District Court screened Plaintiff's first amended complaint and allowed some of Plaintiff's claims to proceed but dismissed other claims and stayed this action to allow the parties to engage in mediation discussions. (ECF No. 9.) On February 3, 2020, Plaintiff filed a motion for leave to file a motion for reconsideration, together with a motion for reconsideration regarding the claims that the Court dismissed. (ECF Nos. 10, 10-1.) On April 13, 2020, Plaintiff filed a second motion for leave to file the previous

¹ This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 motion for reconsideration. (ECF No. 12.) Plaintiff later filed a motion for leave to file a
2 second amended complaint (“SAC”), together with an SAC (ECF Nos. 13, 13-1), as well
3 as two motions for leave to file a longer than standard SAC. (ECF Nos. 14, 15.) Plaintiff
4 then filed a motion for leave to file a third amended complaint (“TAC”) (ECF No. 21),
5 together with a TAC (ECF No. 21-1) and a motion for leave to file a longer than standard
6 TAC (ECF No. 22), which the District Court again screened. (ECF No. 27.)

7 The TAC alleged the following claims: (1) Count I, equal protection; (2) Count II,
8 retaliation; (3) Count III, deliberate indifference to serious medical needs; (4) Count IV,
9 due process; and (5) Counts V and VI, state law torts. (ECF No. 28.) The Court allowed
10 Plaintiff to proceed only on his Count III, deliberate indifference to serious medical needs
11 claim against Defendants Spiece, Dreesen, Oliver, Carillo, Lewis, Gang, and Howell and
12 the remainder of Plaintiff’s claims were dismissed, without prejudice. (ECF No. 27.)

13 Before Defendants filed an answer to the TAC, Plaintiff filed his proposed FAC
14 (ECF No. 29-1), which the court now screens pursuant to 28 U.S.C. § 1915A.

15 **II. SCREENING STANDARD**

16 Federal courts must conduct a preliminary screening in any case in which an
17 incarcerated person seeks redress from a governmental entity or officer or employee of
18 a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the Court must identify
19 any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a
20 claim upon which relief may be granted, or seek monetary relief from a defendant who is
21 immune from such relief. See *id.* §§ 1915A(b)(1), (2). Pro se pleadings, however, must
22 be liberally construed. See *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.
23 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
24 elements: (1) the violation of a right secured by the Constitution or laws of the United
25 States, and (2) that the alleged violation was committed by a person acting under color
26 of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

27 In addition to the screening requirements under § 1915A, pursuant to the Prison
28 Litigation Reform Act (“PLRA”), a federal court must dismiss an incarcerated person’s

1 claim if “the allegation of poverty is untrue” or if the action “is frivolous or malicious, fails
2 to state a claim on which relief may be granted, or seeks monetary relief against a
3 defendant who is immune from such relief.” 28 U.S.C. § 1915(e)(2). Dismissal of a
4 complaint for failure to state a claim upon which relief can be granted is provided for in
5 Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under
6 § 1915 when reviewing the adequacy of a complaint or an amended complaint. When a
7 court dismisses a complaint under § 1915(e), the plaintiff should be given leave to
8 amend the complaint with directions as to curing its deficiencies, unless it is clear from
9 the face of the complaint that the deficiencies could not be cured by amendment. See
10 *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

11 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
12 *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to
13 state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in
14 support of the claim that would entitle him or her to relief. See *Morley v. Walker*, 175
15 F.3d 756, 759 (9th Cir. 1999). In making this determination, the court takes as true all
16 allegations of material fact stated in the complaint, and the court construes them in the
17 light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th
18 Cir. 1996). Allegations of a pro se complainant are held to less stringent standards than
19 formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). While
20 the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff
21 must provide more than mere labels and conclusions. See *Bell Atl. Corp. v. Twombly*,
22 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is
23 insufficient. See *id.*

24 Additionally, a reviewing court should “begin by identifying pleadings [allegations]
25 that, because they are no more than mere conclusions, are not entitled to the
26 assumption of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal
27 conclusions can provide the framework of a complaint, they must be supported with
28 factual allegations.” *Id.* “When there are well-pleaded factual allegations, a court should

1 assume their veracity and then determine whether they plausibly give rise to an
 2 entitlement to relief.” *Id.* “Determining whether a complaint states a plausible claim for
 3 relief . . . [is] a context-specific task that requires the reviewing court to draw on its
 4 judicial experience and common sense.” *Id.*

5 Finally, all or part of a complaint filed by an incarcerated person may be
 6 dismissed *sua sponte* if that person’s claims lack an arguable basis either in law or in
 7 fact. This includes claims based on legal conclusions that are untenable (e.g., claims
 8 against defendants who are immune from suit or claims of infringement of a legal interest
 9 which clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
 10 fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319, 327–28 (1989);
 11 *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

12 **III. SCREENING OF FOURTH AMENDED COMPLAINT**

13 In the FAC, Plaintiff sues multiple defendants for events that took place while
 14 Plaintiff was in the custody of the Nevada Department of Corrections (“NDOC”). (ECF
 15 No. 29-1 at 1.) Plaintiff sues Defendants Darren Spiece, F. Hammel, Frank Dreesen,
 16 Hernandez, Hollingsworth, Ivan Dubon, Jenny Byrnes, Jerry Howell, Jo Gentry, Joseph
 17 Lewis, Philip Gang, Ronald Oliver, Ericka Samano-De La Torre, Sanchez, Sandoval,
 18 Sonya Carrillo, William Reubart, Pam Del Porto, and Lanita Anderson. (*Id.* at 1-8.)
 19 Plaintiff alleges six counts and seeks declaratory and monetary relief. (*Id.* at 21-52.)

20 The FAC alleges the following: On August 27, 2017, Plaintiff was charged a
 21 “Major Infraction” by C.O. Dubon for a diluted urine sample. (*Id.* at 8.) Plaintiff had a
 22 disciplinary hearing regarding the charge on June 12, 2017. (*Id.*) Plaintiff put up a
 23 defense and was found not guilty of the charge. (*Id.* at 8-9.) Following the dismissal of
 24 the major infraction, Dubon threatened to “get” Plaintiff “sooner or later.” (*Id.* at 9.)
 25 Plaintiff alleges that Dubon’s “retaliatory attitude” was in relation to Plaintiff’s exercise of
 26 his “free speech” to present a defense at his disciplinary hearing. (*Id.*) Plaintiff asserts
 27 that in the following months he was subjected to various harassing comments and
 28 remarks by Dubon. (*Id.*)

1 Next, Plaintiff alleges that on November 24, 2017, Plaintiff had a “mandown” for
2 untreated medical and dental issues, which are the subject of a separate lawsuit—3:18-
3 cv-00282-MMD-CLB. (*Id.*) Dubon was not present at this “mandown” and Plaintiff was
4 not given a urinalysis (“UA”) for drugs. (*Id.*) On December 15, 2017, Plaintiff had
5 another “mandown” for the same untreated medical issues. (*Id.*) Plaintiff alleges that
6 during the course of the medical emergency, Dubon “went out of his way” “to confront”
7 Plaintiff in the infirmary. (*Id.*) Dubon interfered with the medical emergency to obtain a
8 UA, which Plaintiff alleges was due to Plaintiff’s “protected conducted of using [his] due
9 process [and] free speech rights that resulted in the dismissal of [Dubon’s] previous
10 charge.” (*Id.* at 9-10.) During the medical emergency, Plaintiff had a seizure and hit his
11 head on concrete. (*Id.* at 10.) Dubon made comments to other guards about Plaintiff
12 being an “addict” while on his way to the Valley Hospital. (*Id.*) At Valley Hospital,
13 Plaintiff was given a full evaluation, including lab work, and a nurse relayed that the
14 incident was “not drug related.” (*Id.*) Upon returning to the facility, Plaintiff filled out a
15 Release of Information to obtain all documents from Valley Hospital, and such records
16 are now in Plaintiff’s medical file. (*Id.* at 10-11.)

17 Plaintiff alleges in early January 2018 he was punished by being put in a
18 “behavior modification unit,” (“BMU”)—without a hearing—where he was stripped of his
19 level, programs, and appliances, and immediately began losing good time credits,
20 affecting the length of his sentence. (*Id.* at 11.) On January 12, 2018, Plaintiff claims he
21 was drugged and transferred unconsciously to a strip cell at the High Desert State Prison
22 (“HDSP”) in retaliation for filing a grievance.² (*Id.*) On January 16, 2018, Plaintiff was
23 told he was being charged for a “dirty UA” from December 15, 2017, which is why he
24 was placed in the BMU at the Southern Desert Correctional Center (“SDCC”). (*Id.*)
25 Plaintiff was not allowed to see or sign the Notice of Charges (“NOC”). (*Id.* at 12.)
26 Plaintiff pled not guilty and requested various inmate witnesses who were present at the

27
28 ² Plaintiff states these allegations are the subject of a separate lawsuit—3:18-cv-
00282-MMD-CLB and are included for “clarity only, not as a claim in this case.”

1 December 15, 2017 “mandown” as well as evidence including blood test results from
2 Valley Hospital. (*Id.*) When Plaintiff received the NOC, they were incomplete and
3 incorrect. (*Id.*)

4 During this time, Plaintiff was in pain from injuries, as well as medical and dental
5 issues (subject of lawsuit 3:18-cv-00282-MMD-CLB), and tried to obtain pain relief,
6 vitamins, allergy pills, Orajel, muscle rub, and antacids from the canteen, but was told
7 the items were unavailable. (*Id.* at 12-13.)

8 On February 7, 2018, Hollingsworth conducted a PREA/transfer assessment
9 follow-up and Plaintiff complained about Carrillo, Dubon, PREA issues, and the
10 December 15th “mandown” and UA. (*Id.* at 13.) In February or early March 2018, Dubon
11 made various remarks to Plaintiff about writing kites and grievances and threatened
12 Plaintiff by saying “keep messing with fire [and] your (sic) gonna (sic) keep getting
13 burned.” (*Id.*) Plaintiff alleges Dubon also threatened that he had “the ‘Juice’” to send
14 Plaintiff to HDSP, Arizona, or Ely State Prison. (*Id.*)

15 On February 15, 2018, Plaintiff alleges he had a “mock disciplinary hearing” with
16 Spiece, Hernandez, and Hollingsworth. (*Id.*) The charging officer changed from
17 Sanchez to Samano-De La Torre without “any notice or justification.” (*Id.* at 14.) Plaintiff
18 alleges Spiece, Hernandez, and Hollingsworth turned a “blind eye to the fact that
19 medical was not contacted prior to a ‘NOC’,” and that the UA was taken “in a harassing
20 manner in the course of a medical emergency by Dubon.” (*Id.*) Spiece, Hernandez, and
21 Hollingsworth denied Plaintiff his witnesses, including the two correctional officers that
22 could verify Plaintiff’s negative blood test. (*Id.*) Plaintiff alleges they also denied
23 Plaintiff’s requested evidence. (*Id.*) Further, Plaintiff alleges that instead of summoning
24 Carrillo to the hearing, Spiece, Hernandez, and Hollingsworth “kicked [Plaintiff] out of the
25 room” and called Carrillo, where she made a statement against Plaintiff that was not put
26 in his record. (*Id.*) Plaintiff claims that there were numerous complaints on filed by him
27 against Carrillo. (*Id.* at 14-15.) Plaintiff claims the audio tape of the disciplinary hearing
28 was stopped when he was “kicked [] out of the room,” and there was a “meeting of the

1 minds” between Spiece, Hernandez, Carrillo, and Hollingsworth. (*Id.* at 15.) Plaintiff
 2 claims Carrillo lied about there being no blood test taken at Valley Hospital. (*Id.*)

3 Plaintiff asserts he was found guilty based on “UA test results that a blood test will
 4 prove false”, based on an officer report from a different charging officer, and based on
 5 Carrillo’s statement, which was made against Plaintiff in retaliation for his protected
 6 conduct of filing meritorious complaints against her. (*Id.* at 15-16.) As a direct result of
 7 the disciplinary charge, Plaintiff lost approximately 50 days of good time/work time from
 8 January 2018 through May 2018. (*Id.* at 17.)

9 Plaintiff’s PREA case manager eventually submitted him for a transfer to another
 10 medium security prison. (*Id.* at 18-20.) Instead of transferring Plaintiff to another medium
 11 security prison, John Does 1-6 transferred Plaintiff to a maximum-security prison in
 12 violation of prison policies. (*Id.*) Based on these allegations, Plaintiff brings six counts.
 13 The court will address each of these counts in turn.

14 **A. Count I – Fourteenth Amendment Due Process**

15 In Count I, Plaintiff alleges that he was not provided due process for his
 16 disciplinary hearing. (ECF No. 29-1 at 22.) To state a cause of action for deprivation of
 17 procedural due process, a plaintiff must first establish the existence of a liberty interest
 18 for which the protection is sought. *Sandin v. Conner*, 515 U.S. 472, 487 (1995).

19 The court finds that Plaintiff fails to establish the existence of a liberty interest.
 20 Plaintiff asserts that NRS 209.4465 creates a liberty interest in good time credits, which
 21 he alleges he “lost” 50 days-worth of credits as a result of the disciplinary action. (ECF
 22 No. 29-1 at 22.) While “States may under certain circumstances create liberty interests
 23 which are protected by the Due Process Clause,” “such interests will be generally limited
 24 to freedom from restraint” that impose atypical and significant hardship on the inmate.
 25 *Sandin*, 515 U.S. at 487. Simply alleging that a defendant violated state law is not
 26 sufficient to state a claim for violation of the Fourteenth Amendment’s Due Process
 27 clause. *Swarthout*, 562 U.S. at 222 (holding that “a ‘mere error of state law’ is not a
 28 denial of due process”); *see also Young v. Williams*, Case No. 2:11-CV-01532-KJD,

1 2012 WL 1984968, at *3 (D. Nev. June 4, 2012) (holding that alleged error in applying
2 good time credits to sentence was an error of state law that did not constitute a due
3 process violation). Additionally, Nevada state prisoners do not have a liberty interest in
4 the discretionary grant of parole or in eligibility for such parole. See *Moor v. Palmer*, 603
5 F.3d 658, 661-62 (9th Cir. 2010); *Fernandez v. Nevada*, No. 3:06-CV-00628-LRH-RAM,
6 2009 WL 700662, at *10 (D. Nev. Mar. 13, 2009).

7 However, in some circumstances, state statutory requirements mandating the
8 treatment of good time credits in particular ways will necessarily impact the duration of
9 the prisoner's confinement. An inmate has no due process liberty interest in "good time
10 credits" unless a state law creates such an interest. See *Greenholtz v. Inmates of the*
11 *Nebraska Penal and Correctional Complex*, 442 U.S. 1, 8–11 (1979). In *Sandin*, the
12 Supreme Court characterized the issue regarding the treatment of good time credits as a
13 liberty interest in a "shortened prison sentence" which resulted from a statutory
14 requirement that good time credits were revocable only if the prisoner was guilty of
15 serious misconduct. *Sandin*, 515 U.S. at 477 (quoting *Wolff*, 418 U.S. at 557). The
16 Supreme Court then went on to hold that, even when a state statute uses mandatory
17 language creating rights under state law, a state can create a liberty interest that invokes
18 procedural protections under the Due Process Clause only if the state's
19 action "will *inevitably* affect the duration of his sentence" or if there are prison conditions
20 that impose "atypical and significant hardship on the inmate in relation to the ordinary
21 incidents of prison life." *Sandin*, 515 U.S. at 484, 487 (emphasis added).

22 Here, the question is whether the alleged removal of credits inevitably affects the
23 duration of Plaintiff's sentences. It does not. This is not a situation where the application
24 of credits would necessarily affect the expiration date of Plaintiff's sentences. Even if
25 Plaintiff were to have good time credits applied to his parole eligibility dates, the
26 maximum terms for his sentences would not change. Plaintiff's claims affect only his
27 parole *eligibility* dates. Nevada's parole scheme intentionally and explicitly makes parole
28 discretionary; an offender therefore is not required to be released once he serves the

1 minimum term and is only considered for parole at that time. See *Moor*, 603 F.3d at 661-
 2 62. Thus, an earlier parole eligibility date does not inevitably affect the duration of a
 3 prisoner's sentence. See *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005) (holding that
 4 speeding up *consideration* for parole does not necessarily imply the invalidity of the
 5 duration of the prisoner's sentence); *Klein v. Coblentz*, 1997 WL 7675384, *4 (10th Cir.
 6 1995) (relying on *Sandin* to hold that, where good time credits applied under state law
 7 only to determining the prisoner's parole eligibility date and not to a sentence reduction,
 8 the loss of credits did not inevitably increase the duration of the sentence and there was
 9 no liberty interest giving rise to due process protections). Therefore, Plaintiff does not
 10 adequately allege a liberty interest and does not and cannot state a procedural due
 11 process claim or a substantive due process claim. Accordingly, the court recommends
 12 that the due process claim be dismissed with prejudice, as further amendment would be
 13 futile. See *Cato*, 70 F.3d at 1106.

14 **B. Counts II, III, and IV – First Amendment Retaliation**

15 Prisoners have a First Amendment right to file prison grievances and to pursue
 16 civil rights litigation in the courts. *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2004).
 17 “Without those bedrock constitutional guarantees, inmates would be left with no viable
 18 mechanism to remedy prison injustices. And because purely retaliatory actions taken
 19 against a prisoner for having exercised those rights necessarily undermine those
 20 protections, such actions violate the Constitution quite apart from any underlying
 21 misconduct they are designed to shield.” *Id.*

22 To state a viable First Amendment retaliation claim in the prison context, a plaintiff
 23 must allege: “(1) [a]n assertion that a state actor took some adverse action against an
 24 inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4)
 25 chilled the inmate’s exercise of his First Amendment rights, and (5) the action did not
 26 reasonably advance a legitimate correctional goal.” *Id.* at 567-68. Total chilling is not
 27 required; it is enough if an official’s acts would chill or silence a person of ordinary
 28 firmness from future First Amendment activities. *Id.* at 568-69.

1 The court finds that Plaintiff fails to state colorable First Amendment claims in
2 Counts II, III, or IV. In Count II, Plaintiff asserts that after lodging his own defense and
3 being found “not guilty” for a major rule violation, Dubon became hostile towards Plaintiff,
4 “threatening retaliation.” (ECF No. 29-1 at 26.) Dubon was also allegedly “aggressive
5 [and] intimidating, making vindictive comments.” (*Id.* at 27.) Additionally, Plaintiff claims
6 that Dubon performed a UA during a “mandown” because of Plaintiff’s “protected
7 conduct.” (*Id.* at 28.) According to the FAC, Dubon’s vindictive behavior was the result
8 of Plaintiff being found not guilty of disciplinary charges related to a diluted urine sample,
9 not any protected conduct on Plaintiff’s part. Additionally, verbal harassment or abuse is
10 insufficient to state a constitutional deprivation under 42 U.S.C. § 1983. *Oltarzewski v.*
11 *Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987). Further, Plaintiff’s vague and conclusory
12 allegations that Dubon acted in a retaliatory manner in requiring a urine sample during
13 Plaintiff’s medical event on December 15, 2017, are insufficient to state a claim for
14 retaliation.

15 In Count III,³ Plaintiff alleges Carrillo made certain statements and withheld
16 evidence during the disciplinary hearing because of Plaintiff’s protected conduct. (ECF
17 No. 29-1 at 31-34.) Plaintiff seems to assert that he was found guilty of a “dirty UA”
18 based solely on statements from Carrillo and those statements were made in retaliation
19 for Plaintiff filing grievances and complaints against her. However, Plaintiff contradicts
20 the facts asserted in his own FAC, which state he was found guilty of the major infraction
21 based on urine sample test results, the report of a charging officer, and based on
22 Carrillo’s statement. (See *id.* at 15-16.) Not only are Plaintiff’s allegations vague and
23 conclusory, but the allegations also seem to contradict other allegations in his complaint
24 and are thus insufficient to state a claim for retaliation.

25 In Count IV, Plaintiff alleges that he was transferred to Ely State Prison (“ESP”) in
26 retaliation for protected conduct, and “proof of the transfer being in retaliation is in the
27

28 ³ In Count III, Plaintiff asserts additional allegations related to his disciplinary
hearing, which are addressed *supra*, in section A.

1 fact that the transfer would not have occurred without the protected conduct.” (*Id.* at 40.)
 2 These vague and conclusory allegations are insufficient to state a colorable retaliation
 3 claim. Additionally, “an inmate has no justifiable expectation that he will be incarcerated
 4 in any particular prison within a State.” See *Olim v. Wakinekona*, 461 U.S. 238, 245
 5 (1983).

6 Accordingly, based on all of the above, the court recommends Plaintiff’s claims of
 7 First Amendment retaliation be dismissed, with prejudice, as further amendment would
 8 be futile. See *Cato*, 70 F.3d at 1106.

9 **C. Count V – Eighth Amendment Cruel and Unusual Punishment**

10 In Count V, Plaintiff asserts he had a series of ongoing medical issues that
 11 caused him significant pain. Plaintiff was treating his pain with medication purchased
 12 from the prisoner store. Plaintiff’s access to the prison store was restricted because of
 13 the charges related to his urine sample. Plaintiff points the court to another lawsuit
 14 Plaintiff has filed, 3:18-cv-00282-MMD-CLB, in which he asserts claims related to the
 15 underlying medical conditions for which he sought pain medication discussed in the
 16 present lawsuit.

17 While the Court previously allowed Plaintiff to proceed on deliberate indifference
 18 to serious medical needs claims based on the allegations laid out in Count V (previously
 19 labeled as Count III in the TAC (see ECF No. 28)), it is not apparent to the court why
 20 Plaintiff is pursuing claims that appear to allegedly arise from the same nucleus of
 21 operative facts and transactions or series of transactions in multiple actions.

22 The court is authorized to control its docket and can take steps in the interests of
 23 judicial economy to limit efforts by the same plaintiff from filing multiple suits based upon
 24 the same alleged underlying conduct by the same defendants when one suit will do.
 25 See *Adams v. Cal. Dep’t of Health Servs.*, 487 F.3d 684, 688, 692-93 (9th Cir.
 26 2007), *overruled on other grounds by Taylor v. Sturgell*, 553 U.S. 880, 904 (2008); see
 27 also *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817
 28 (1976) (noting that between federal district courts, “the general principle is to avoid

1 duplicative litigation”). A plaintiff is “not at liberty to split up his demand, and prosecute it
2 by piecemeal, or present only a portion of the grounds upon which special relief is
3 sought, and leave the rest to be presented in a second suit, if the first fail[s].” *Cook v.*
4 *C.R. England, Inc.*, 2012 WL 2373258, at *3 (C.D. Cal. June 21, 2012) (quoting *United*
5 *States v. The Haytian Republic*, 154 U.S. 118, 125 (1894)).

6 “[I]n assessing whether the second action is duplicative of the first,” a court must
7 “examine whether the causes of action and relief sought, as well as the parties or privies
8 to the action, are the same.” *Adams*, 487 F.3d at 689 (citing *The Haytian Republic*, 154
9 U.S. at 124). Where, as here, a district court has “duplicative suits contemporaneously
10 pending on its docket,” the court has discretion to dismiss a duplicative later-filed action,
11 to stay that action pending resolution of the previously filed action, to enjoin the parties
12 from proceeding with it, or to consolidate both actions, depending on the circumstances
13 of the case. *Id.* at 692; see also Fed. R. Civ. Proc. 42(a) (permitting the court to
14 consolidate actions that are “before the court” and “involve a common question of law or
15 fact”). “Dismissal of the duplicative lawsuit, more so than the issuance of a stay or the
16 enjoinder of proceedings, promotes judicial economy and the ‘comprehensive
17 disposition of litigation.’” *Adams*, 487 F.3d at 692 (quoting *Kerotest Mfg. Co. v. C-O-Two*
18 *Fire Equip. Co.*, 342 U.S. 180, 183 (1952)).

19 “Whether two events are part of the same transaction or series depends on
20 whether they are related to the same set of facts and whether they could conveniently be
21 tried together.” *Adams*, 487 F.3d at 689 (citation omitted). Here, both the prior filed
22 lawsuit, 3:18-cv-00282-MMD-CLB and the present lawsuit, 3:19-cv-00176-MMD-CLB
23 arise out of a common set of operative facts. The actions also largely assert the same
24 alleged violations of rights and will involve substantially the same evidence in addition to
25 asserting such claims against similar defendants. Thus, the two suits arise out of the
26 “same set of facts” and could “conveniently be tried together.” See *Adams*, 487 F.3d at
27 689 (citation omitted). It appears the equities favor limiting Plaintiff from pursuing
28 multiple suits based on the same underlying conduct and therefore the court

1 recommends that the deliberate indifference to serious medical needs claim in this
2 lawsuit be dismissed and consolidated with his deliberate indifference to serious medical
3 needs claim in case 3:18-cv-00282-MMD-CLB.

4 **D. Count VI – Fourteenth Amendment Equal Protection**

5 In Count VI, Plaintiff brings an equal protection claim based on a “class of one”
6 theory. (ECF No. 29-1 at 45-47.) In the Court’s prior screening order, Plaintiff’s equal
7 protection claim was dismissed without prejudice. (See ECF No. 27 at 8.) The Court
8 found that Plaintiff failed to state a colorable equal protection claim because he generally
9 alleged that every Defendant treated him differently than the Defendant would have
10 treated other inmates and singled him out for poor treatment. But that Plaintiff did not
11 actually allege that there were any inmates in his similar situation who were treated
12 differently than he was. Thus, the allegation that prison officials violated prison
13 regulations, on its own, was insufficient to support an equal protection claim. The Court
14 directed Plaintiff to allege specific facts demonstrating that he was treated different than
15 other similarly situated individuals.

16 In reviewing Plaintiff’s FAC, the court finds that Plaintiff still fails to state a
17 colorable equal protection claim. Plaintiff’s complaint is vague and conclusory and does
18 not provide specific facts, as directed, which demonstrate that he was treated differently
19 than other similarly situated individuals. Accordingly, the court recommends that
20 Plaintiff’s equal protection claim be dismissed, with prejudice, as further amendment
21 would be futile. See *Cato*, 70 F.3d 1106.

22 **IV. CONCLUSION**

23 Based upon the foregoing, the court recommends that Plaintiff’s motion for leave
24 to file a fourth amended complaint (ECF No. 29) and motion to file a longer than
25 standard complaint (ECF No. 30) be granted. The court also recommends that the
26 fourth amended complaint (ECF No. 29-1) be dismissed, with prejudice, as to all claims
27 except for Plaintiff’s Count V deliberate indifference to serious medical needs claim,
28 which should be dismissed, without prejudice, and be consolidated with his claims in

case number 3:18-cv-00282-MMD-CLB.

The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. This Report and Recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that Plaintiff's motion for leave to file the FAC and motion for longer than standard FAC (ECF Nos. 29, 30) be **GRANTED**;

IT IS FURTHER RECOMMENDED that the FAC (ECF No. 29-1) be **DISMISSED, WITH PREJUDICE**, as to Counts I, II, III, IV, and VI;

IT IS FURTHER RECOMMENDED that Count V be **DISMISSED, WITHOUT PREJUDICE**, so that Plaintiff may consolidate the claim with the deliberate indifference to medical needs claim in Case No. 3:18-cv-00282-MMD-CLB; and

IT IS FURTHER RECOMMENDED that the Clerk of the Court **ENTER JUDGMENT** and **CLOSE** this case.

DATED: February 25, 2021


UNITED STATES MAGISTRATE JUDGE